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No. 86-

In the Supreme Court of the United States

OCTOBER TERM, 1986

BILL ARMONTROUT, Warden,
Missouri State Penitentiary,
Petitioner,

vs.

DOUGLAS W. THOMPSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the denial of parole to respondent in September, 1985, by the Missouri Board of Probation and Parole was a vindictive act in retaliation for respondent's prior successful habeas corpus litigation in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App. A1) is reported at 808 F.2d 28. The order denying respondent's motion for reconsideration is unreported and appears in the appendix of this petition (App. A10). The opinion of the United States District Court for the Western District of Missouri (App. A11) is reported at 647 F.Supp. 1093. The District Court's modification of its previous order is unreported and appears in the appendix of this petition (App. A20).

JURISDICTION

The United States Court of Appeals' opinion was filed on December 23, 1986. Pursuant to 28 U.S.C. §2101(c), the present petition for a writ of certiorari was required to be filed within ninety (90) days of the entry of this judgment. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. Missouri Revised Statutes §217.690.1 (1986):

> When in its opinion there is reasonable probability that an inmate of a state correctional institution can be released without detriment to the community or to himself, the board may in its discretion release or parole such person except as otherwise prohibited by law. All paroles shall issue upon order of the board, duly adopted.

STATEMENT OF THE CASE

Respondent, Douglas W. Thompson, filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2241, on August 12, 1985, in the United States District Court for the Western District of Missouri. On September 19, 1985; June 2, 1986; and August 21, 1986, the petitioner filed his responses to United States District Judge Scott O. Wright's show-cause orders. On September 17, 1986, Judge Wright granted respondent a writ of habeas corpus that ordered respondent's unconditional release. This order was modified on October 6, 1986, to require respondent's placement on parole. Petitioner filed a timely appeal to the United States Court of Appeals for the Eighth Circuit. On December 23, 1986, that appellate court affirmed the order of the District Court and ordered respondent be placed on parole immediately. This petition ensues.

To understand the holdings of the lower courts and the flaws in those holdings it is necessary to have a brief understanding of respondent's life of crime. The respondent has been tried three times for the first-degree murder of Police Officer Herbert L. Goss on March 10, 1961. *See* §559.010, RSMo 1959 (now repealed). Each time a jury found respondent guilty of this crime. As a result of the first trial in December, 1961, he was sentenced to death. The opinion affirming this sentence is found in *State v. Thompson*, 363 S.W.2d 711 (Mo. banc 1963). That sentence was set aside by a motion under Missouri Supreme Court Rule 27.26. *State v. Thompson*, 396 S.W. 2d 697 (Mo. banc 1965).

As a result of his second trial in 1966, the respondent was sentenced to imprisonment for life. No appeal was taken from that conviction. In 1980, the respondent was placed on parole by the Missouri Board of Probation and

Parole. Respondent was paroled to a custody detainer by California so he may serve his five-to-life sentence for a California robbery conviction. Respondent served only four months of this sentence before he was released. At that time, respondent's petition for a writ of habeas corpus to vacate the second judgment and sentence was pending in the United States District Court for the Eastern District of Missouri. That court eventually denied the relief respondent sought.

However, in an opinion filed October 14, 1981, the United States Court of Appeals for the Eighth Circuit ordered the second judgment vacated because of improper impaneling of the jury. *Thompson v. White,* 661 F.2d 103 (8th Cir. 1981), *vacated,* 465 U.S. 941 (1982), *aff'd on remand,* 680 F.2d 1173 (8th Cir. 1982), *cert. denied,* 459 U.S. 1178 (1983).

Respondent's third trial was held in December, 1984. The jury returned a verdict of guilty for first-degree murder. As a persistent offender, the respondent was sentenced to imprisonment for life. Upon his reconviction and the entry of a new judgment, respondent was returned to the Missouri State Penitentiary, where he was incarcerated until the United States Court of Appeals for the Eighth Circuit ordered his parole on December 23, 1986.

After appointment of counsel and responsive pleadings, the United States District Court for the Western District of Missouri ordered the writ issue to respondent. The district court held that the Missouri Board of Probation and Parole's refusal to grant parole release in September, 1985, was presumptively vindictive in violation of the Due Process Clause of the Fourteenth Amendment as described by this Court's opinion in *North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). *See Thomp-*

son v. Armontrout, 647 F.Supp. 1093 (W.D.Mo. 1986). The United States Court of Appeals for the Eighth Circuit held that this legal judgment was not clearly erroneous. *Thompson v. Armontrout*, 808 F.2d 28, 31 (8th Cir. 1986). That Court ordered the writ issue without allowing the State an opportunity to correct the error.

From these judgments, petitioner prays this Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in order for this Court to decide this important question of federal law. Supreme Court Rule 17.1(c).

REASON FOR GRANTING WRIT

The Court of Appeals' opinion clearly misconstrues *Pearce* and its progeny.

A.

Before discussing the substance of respondent's constitutional claim, it is necessary to understand this Court's jurisprudence relating to the Due Process Clause and the prohibition against a State's vindictiveness due to a defendant's exercise of his right to appeal. One common thread through the *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) line of cases is that the sentencer must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant given the crime committed. "Highly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Williams v. New York*, 337 U.S. 241, 247, 69 S.Ct. 1079, 1083, 93 L.Ed. 1337 (1949). Allowing

consideration of such a breadth of information ensures that the punishment will suit not merely the offense, but also the individual defendant. *Id. See North Carolina v. Pearce,* 395 U.S. at 723, 89 S.Ct. at 2079; *Wasman v. United States,* 468 U.S. 559, 104 S.Ct. 3217, 3220-3221, 82 L.Ed.2d 424 (1984).

In *Pearce,* however, the United States Supreme Court recognized at least one limitation on the discretion of the sentencing authority where a sentence is increased after reconviction following a successful appeal. Two separate cases were before the court in *Pearce.* In both cases, the defendants successfully appealed their original convictions and, on retrial, received greater sentences than they had received before. The Court held that neither the Double Jeopardy nor the Equal Protection Clauses barred imposition of the greater sentences after the reconviction of the defendants. However, the Court held that the Due Process Clause of the Fourteenth Amendment prevented increased sentences actually motivated by vindictive retaliation by the judge. "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *North Carolina v. Pearce,* 395 U.S. at 725, 89 S.Ct. at 2080. Because fear of such vindictiveness might chill a defendant's decision to appeal or to attack his conviction collaterally, the Court went on to say that "due process also requires that a defendant be freed of apprehension of such retaliatory motivation on the part of the sentencing judge." *Id.* (footnote omitted).

To prevent actual vindictiveness from entering into a decision and to allay any fear on the part of a defendant that an increased sentence is in fact a product of vindictiveness, the Court fashioned what in essence is a "prophylactic

rule," *see Colten v. Kentucky,* 407 U.S. 104, 116, 92 S.Ct. 1953, 1960, 32 L.Ed.2d 584 (1972), that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." *North Carolina v. Pearce,* 395 U.S. at 723, 89 S.Ct. at 2081. This rule was read to create a presumption of vindictiveness, that may be overcome only "by objective information in the record justifying the increased sentence." *United States v. Goodwin,* 457 U.S. 368, 374, 102 S.Ct. 2485, 2489, 73 L.Ed.2d 74 (1982). The rationale for requiring that "the factual data upon which the increased sentence is based" be made part of the record, of course, is that the "constitutional legitimacy" of the enhanced sentence may thereby be readily assessed on appeal. *Id.*

In *Pearce,* the state offered no evidence whatsoever to justify Respondent Rice's increased sentence; it had not even attempted to explain or justify the greater penalty. *North Carolina v. Pearce,* 395 U.S. at 726, 89 S.Ct. at 2081. Similarly, the state advanced no reason for Pearce's sentence beyond the naked power to impose it. *Id.* Finding the record barren of any evidence to rebut the presumption of vindictiveness and support the increased sentences in either of the two cases in *Pearce,* the Supreme Court affirmed the judgments granting relief.

Since the United States Supreme Court's decision in *North Carolina v. Pearce,* there have been several decisions discussing the parameters of the *Pearce* decision. The Court did not apply the presumption of vindictiveness in the context of Kentucky's two-tier trial system because it saw no need to do so. *Colten v. Kentucky, supra.* Under Kentucky law, a defendant convicted of a misdemeanor in the inferior court had the right to a trial *de novo* in a court of general jurisdiction. The Supreme Court rejected the contention in *Colten* that the *de novo* tribune was con-

stitutionally prohibited from imposing a greater sentence than that imposed in the original trial. The Court held that the possibility of vindictiveness found to exist in *Pearce* was not inherent in the Kentucky two-tier system. 407 U.S. at 116, 92 S.Ct. at 1960. Despite the Court's refusal to apply the presumption, the Court noted that it was possible that a defendant may prove actual vindictiveness and thereby establish a due process violation. *Id.* at 119, 92 S.Ct. at 1961.

The Court also rejected the need for the *Pearce* presumption in *Chaffin v. Stynchcombe,* because the Court perceived only a minute possibility that an increased sentence by a jury upon reconviction after a new trial would be motivated by vindictiveness. Not only was the second jury in *Chaffin* unaware of the prior conviction, but in contrast to the judge in *Pearce,* it was thought unlikely that a jury would consider itself to have a "personal stake" in a prior conviction or a motivation to engage in self-vindication. 412 U.S. 17, 27, 93 S.Ct. 1977, 1983, 36 L.Ed.2d 714 (1973). In *Chaffin,* the Court emphasized that *Pearce* was not designed to prohibit increased sentences upon retrial, but rather, the doctrine was premised on the need to guard against vindictiveness in the resentencing process. *Id.* at 25, 93 S.Ct. at 1982. Accordingly, as in *Colten,* the Court condemned actual vindictiveness in the resentencing. *Id.* at 32 n. 20, 93 S.Ct. at 1986 n. 20.

The Court applied the *Pearce* concepts in *Blackledge v. Perry,* 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974). Perry, while in state prison, was involved in a fight with a fellow inmate and charged with the misdemeanor offense of assault with a deadly weapon. He was convicted in the state's district court and was sentenced to a six-month prison term. He appealed to the state's superior court, where, under state law, he had a right to a *de novo* trial.

After the notice of appeal but before the second trial, the prosecutor obtained an indictment against Perry for felony assault. Perry pleaded guilty to the felony offense and was sentenced to a term of five-to-seven years imprisonment, to run consecutive to the sentence he was then serving. The effect of the plea was to increase Perry's sentence by the seventeen months he had already served under the sentence imposed by the district court. *Id.* at 22-23, 94 S.Ct. at 2099-2100.

The United States Supreme Court held that the indictment for the felony offense was impermissible under the Due Process Clause. The Court stated that the opportunity for vindictiveness in that situation compelled the conclusion that due process required a rule analogous to that of the *Pearce* case. *Id.* at 27, 94 S.Ct. at 2102. The prosecutor had a considerable stake in discouraging convicted misdemeanor offenders from appealing and obtaining a *de novo* trial. *Id.* at 27, 94 S.Ct. at 2102. The Court applied the *Pearce* presumption and granted relief because the record was devoid of any explanation for the new indictment. The Court noted that a different result would be necessary if the state had advanced a legitimate nonvindictive justification for the greater charge. *Id.* at 29 n. 7, 94 S.Ct. at 2103 n. 7.

In *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), the Supreme Court held that due process was not implicated when a prosecutor threatened to seek conviction on a greater offense if the defendant did not plead guilty and, in fact, does so when the defendant proceeds to trial. The Court declined to characterize that conduct as punishment or retaliation that would be offensive to due process, but rather, characterized the conduct as a by-product of the give-and-take negotiation common in plea bargaining. *Id.* at 362, 363, 98 S.Ct. at 667, 668.

Likewise, in *United States v. Goodwin*, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982), the Court held that the *Pearce* presumption of vindictiveness was unwarranted where, before trial, a prosecutor added a felony charge to a defendant's misdemeanor charge after the defendant demanded a jury trial on the misdemeanor charge. The Court thought it unlikely that a prosecutor would respond to a defendant's pre-trial demand for a jury trial by bringing charges not in the public's interest. *Id.* at 384, 102 S.Ct. at 2492. The *Goodwin* Court noted that the Court had been wary of extending the *Pearce* presumption of vindictiveness when the likelihood of vindictiveness is not as pronounced as it was in *Pearce* and *Blackledge*. The Court grounded its reluctance to extend the presumption because the presumption operated to block the state's legitimate response to criminal conduct. *Id.* at 373, 102 S.Ct. at 2489.

In *Wasman v. United States*, the Court was faced with a situation where the trial court knew of one of the defendant's convictions at the time of the initial sentencing. After sentencing, the defendant appealed, and the judgment was reversed. Following the new trial, a harsher sentence was imposed because petitioner had suffered an additional conviction for conduct that occurred prior to the first trial. Although the trial judge was aware of the conduct at the time of the first trial, he did not consider that conduct because it would have unjustly increased the sentence after the first trial. 104 S.Ct. at 3220. The Court applied the presumption of vindictiveness because the same trial judge, the sentencing authority, increased the sentence following a successful appeal. *Id.* at 3223. The Court presumed that the increased sentence was the product of actual vindictiveness aroused by the defendant's appeal. In contrast to *Pearce* and *Blackledge*, the trial judge in *Wasman* carefully explained his reasons for im-

posing the greater sentence. *Id.* at 3223. The new criminal conviction obtained between the original sentencing and the retrial sentencing was a legitimate consideration for the trial judge. *Id.* at 3224. The fact that the new conviction arose from conduct which occurred before the original trial was not relevant. "There is no logical support for a distinction between 'events' and 'conduct' of the defendant occurring after the initial sentencing insofar as the kind of information that may be relied upon to show a nonvindictive motion is concern." *Id.* at 3225. The *Wasman* court noted that the new information, the conviction, helped in applying the philosophy of modern sentencing: to consider the person as well as the crime. *Id., citing, Williams v. New York,* 337 U.S. at 247, 69 S.Ct. at 1083. Accordingly, although the Court applied the *Pearce* presumption, the state overcame the presumption due to its ability to demonstrate that the increased sentence was the result of enlightened sentencing, not vindictiveness. *Id.*

In *Texas v. McCullough,* ..... U.S. ....., 106 S.Ct. 976, 977-980, 89 L.Ed.2d 104 (1986), the Supreme Court explained that the "evil the court sought to prevent" in *North Carolina v. Pearce* was the "vindictiveness of a sentencing judge" due to his being reversed by an appellate court. In *McCullough,* the Court found no basis for applying the presumption of vindictiveness. In that case, the jury imposed a twenty-year sentence upon the defendant after his trial for murder. After trial, the trial judge granted the defendant's motion for a new trial on the basis of prosecutorial misconduct. Three months later, the defendant was retried and found guilty by the jury. At this trial, the defendant elected to have his sentence set by the trial judge. Accordingly, the trial judge imposed a sentence of fifty years imprisonment. 106 S.Ct. at 978.

The Supreme Court refused to apply the presumption of vindictiveness to this increase in punishment. The Court reasoned that the granting of the motion for new trial after the original trial hardly suggested any vindictiveness against the defendant by the trial judge. There was no motive to engage in self-vindication because that trial judge had not been reversed. By focusing upon whether the sentencing judge had a vindictive motive, the Supreme Court ruled that the presumption was inapplicable. Granting a motion for new trial indicated that petitioner's claims concerning the first trial had merit; thus, the trial judge could not have a motive of discouraging what he regarded as meritless appeals. *Id.* at 979. To apply the presumption in that situation would imply that a judge would be vindictive to a defendant merely because the defendant sought an acquittal. The Court demurred from that characterization of the national judiciary. *Id.*

The Court emphasized its reluctance to apply the presumption where the possibility of vindictiveness is merely speculative. That reluctance was grounded in the Court's desire not to block legitimate prosecution. *Id.* at 979-980. The Court also noted that defendant chose to be sentenced by the judge at this trial. The Court viewed that the vote of confidence in the trial judge supported its finding that there was no basis for finding a motive for vindictiveness by the trial judge. Lastly, the Supreme Court refused to apply the presumption because the jury was the sentencer at trial one, and the judge was the sentencer at trial two. The Court noted that the difference in sentences could be explained in two fashions: The Court refused to assume that the second sentence was too severe, where it could assume that the first sentence was too lenient. *Id.* at 980, *quoting, Colten v. Kentucky, supra.* That was especially apt where the second sentencer pro-

vided, on the record, logical nonvindictive reasons for the second sentence. *Id.*

Lastly, the Supreme Court found that even if the *Pearce* presumption applied, the presumption had been overcome by the state. The trial court made an on-the-record logical statement for the increase in the sentence. The trial court noted that there was new evidence presented during the second trial that was not presented at the defendant's first trial and was never made known to the first sentencer, the jury. Specifically, two witnesses testified that the defendant played a direct role in slashing the throat of the victim. Additionally, the trial judge explained that she learned for the first time at the second trial that the defendant had been released from prison only four months before the instant crime had been committed. Lastly, the trial judge stated that if she had fixed the first sentence, she would have imposed more than twenty years. *Id.* at 978. On this record, the United States Supreme Court had no difficulty in ruling that there was no vindictiveness in the increased sentencing of that defendant. *Id.* at 982. In light of this statement of the law, it becomes necessary to review the judgment of the District Court and the Court of Appeals.

B.

Cursory examination of the District Court's opinion, *Thompson v. Armontrout*, 647 F.Supp. 1093 (W.D.Mo. 1986) (App. A11) and the Court of Appeals' opinion, *Thompson v. Armontrout*, 808 F.2d 28 (8th Cir. 1986) (App. A-1), will demonstrate to this Court the need to issue a writ of certiorari due to the confusion about *Pearce* and its progeny. The District Court and the Court of Appeals cited indiscriminately to this Court's cases without an understanding of the principles for which they stand. There was no basis upon which to apply the *Pearce*

presumption of vindictiveness. Respondent was originally sentenced to death. Following his two later convictions, he was sentenced to life imprisonment. Thus, this subsequent sentences are no more severe than the original sentence. In fact, respondent's present life imprisonment sentence is substantially less severe than his initial death sentence. Upon these facts, there is no foundation to justify application of the *Pearce* presumption.

As in *Texas v. McCullough,* there are no facts to justify use of the presumption. Respondent's second conviction was obtained in the Mississippi County Circuit Court in 1966. *Thompson v. White,* 661 F.2d 103, 104 (8th Cir. 1981, *vacated,* 456 U.S. 951 (1982), *aff'd on remand,* 680 F.2d 1173 (8th Cir. 1982), *cert. denied,* 459 U.S. 1178 (1983). Following reversal of the conviction, respondent's third trial occurred before a different judge in the Scott County Circuit Court in 1984, almost twenty years after the second conviction. Although the entity that sentenced respondent was the same for each conviction (the trial judge), petitioner submits that the two trial judges should be considered as separate people. The reason is quite simple—the two trial judges were separate people. The goal of *Pearce* was to prevent vindictiveness is sentencing by the first trial judge who had been reversed by an appellate court. The *Pearce* court hoped to deter fear of vindictiveness for the successful use of a direct appeal or a collateral attack of a judgment and sentence. 395 U.S. at 725-726, 96 S.Ct. at 2080-2081. That goal of *Pearce* can only be fulfilled when there is a demonstration of causal connection between the reversal of the conviction and the alleged vindictiveness. If a trial judge is harsher for a reason other than vindictiveness resulting from a reversal, then there is no unconstitution deterrence of a defendant's use of the right of appeal or collateral attack. *Texas v. McCullough,* 106 S.Ct. at 981.

Before the District Court, the respondent alleged that the Honorable Anthony J. Heckemeyer (the third trial judge) was vindictive, but did not allege or prove that the alleged vindictiveness was causally related to the reversal of the second conviction by the United States Court of Appeals for the Eighth Circuit. The lack of causal connection between the Eighth Circuit's reversal of the second conviction and Heckemeyer's alleged vindictiveness is not surprising. Judge Heckemeyer had no reason to be vindictive because the Eighth Circuit did not scrutinize Heckemeyer's actions and did not reverse his judgment. It was the Mississippi County Circuit Judge who was scrutinized and reversed by the Eighth Circuit. 661 F.2d at 104-107. Since two different people sentenced petitioner following his second and third trials, the presumption of vindictiveness cannot be applied.

In *Colten v. Kentucky*, the United States Supreme Court recognized that when different sentences are involved, it may be that the second sentencer imposed a correct sentence while the first sentencer imposed the lenient penalty. 407 U.S. at 117, 92 S.Ct. at 1960; *see also Chaffin v. Stynchcombe, supra* (jury imposed increased sentence on retrial). The court in *Chaffin*, expressly held that the presumption is derived from the judge's "personal stake in the prior conviction." 412 U.S. at 27, 93 S.Ct. at 193. In fact, the *McCullough* court expressly refused to apply *Pearce* where two different sentencers were involved. *Texas v. McCullough*, 106 S.Ct. at 890 n.3. In the present case, since petitioner was sentenced by two different judges following this second and third trials, there is no basis for the application of the presumption. Not only was the last judge's sentence not harsher, but also, the sentence was imposed by two different sentencers; thus, the presumption of vindictiveness cannot be invoked.

For these reasons, it is unsurprising that the District Court did not hold that the presumption of vindictiveness applied to the actions of Judge Heckemeyer when he resentenced respondent to life imprisonment. *Thompson v. Armontrout*, 647 F.Supp. at 1095 (App. A15). Despite this holding, there is some loose language by the District Court that may confuse this Court in its review of this case. The District Court held:

> Thus, the *Pearce* presumption of vindictiveness may apply to second sentences which are more severe in terms of parole eligibility. If the judge had sentenced [respondent] to life imprisonment without possibility of parole, such a sentence would be *a fortiori* more severe for due process purposes than the previous life sentences.

Id. at 1095-1096 (App. A16). While that may be a true general statement of the law, the District Court rightfully did not apply that statement to the case at bar. There was no evidence before the District Court to indicate that [respondent's] current life sentence was "more severe" for parole eligibility. Likewise, there was no evidence before the District Court to indicate that the Honorable Judge Heckemeyer realized that the second life sentence was more severe in terms of parole eligibility. Without that understanding, it is impossible to state that Heckemeyer's sentence was harsher or that he acted vindictively. Even if there were evidence of such a realization by Heckemeyer, there was no evidence to causally connect Judge Heckemeyer's "harsher" life sentence to a vindictive motive as a result of respondent's successful prior habeas corpus litigation.

Respondent argued before the District Court that the *Pearce* presumption of vindictiveness applied to the Parole Board proceeding in September, 1985. That claim ignored

the fact that the Missouri Board of Probation and Parole had no reason to be vindictive due to the 1982 reversal of petitioner's conviction. The United States Court of Appeals for the Eighth Circuit scrutinized and reversed the Circuit Court of Mississippi County, not a decision or procedure of the Missouri Board of Probation and Parole. *Thompson v. White,* 661 F.2d at 104-106. Additionally, the *Pearce* presumption of vindictiveness should not apply because there was no increase in punishment from the 1985 Board action. The Parole Board stated in its memorandum to the respondent on December 18, 1985:

> When you were place to your custody detainer, November 21, 1980, it was not the intent of the Board that you would be released from confinement. It was, in fact, the belief of the Board that because of your five-to-life sentence in the State of California that you would be incarcerated in that state for an extended period of time.

Respondent's Exhibit K-2.[1] It is apparent that the Missouri Board of Probation and Parole was not extending respondent's sentence, but rather, was adjusting an unanticipated lenient sentence (an unserved sentence). *See Colten v. Kentucky,* 407 U.S. at 117, 92 S.Ct. at 1960.

The District Court's opinion is unclear as to whether the District Court was applying the *Pearce* presumption of vindictiveness or whether the District Court found actual vindictiveness by agents of the State of Missouri. *Thompson v. Armontrout,* 647 F.Supp. at 1096 (App. A16). Regardless of which was the District Court's conclusion, petitioner

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1. Citation to respondent's exhibits refers to those exhibits filed by petitioner Armontrout in his response to the District Court's Show-Cause Order, filed on June 2, 1986. Citation to petitioner's exhibits refers to those exhibits filed in the District Court by respondent Thompson.

submits that either the *Pearce* presumption has been refuted or there is no basis for concluding actual unconstitutional vindictiveness by any arm of the State of Missouri.

The District Court found the first "impermissible motive" for the Board's denial of parole was Judge Heckemeyer's alleged statement to the Missouri Board of Probation and Parole. *Id.* (App. A16-17). The District Court seemed concerned that Judge Heckemeyer allegedly told the Board that respondent had been convicted three times, that thirty-six had found respondent guilty and recommended that respondent serve a life sentence (Petitioner's Exhibit 6). Even assuming Judge Heckemeyer made such statements, petitioner submits that such statements are statements of the obvious. The Court of Appeals vacated respondent's second conviction in 1982. *See Thompson v. White*, 680 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1178 (1983). For respondent to be convicted of the same crime, it is apparent that he must have been convicted again. Equally apparent is the fact that to be convicted again, respondent must have had a third trial for first-degree murder. Under Missouri law, a conviction must be based on the assent of twelve jurors. Since respondent had three trials with twelve jurors at each trial, it must logically follow that there were thirty-six jurors (thirty-six of petitioner's peers) that found petitioner guilty of first-degree murder. Additionally, it is obvious that Judge Heckemeyer sentenced petitioner to life imprisonment. The Missouri Board of Probation and Parole would have known this fact from a cursory examination of the public record, the judgment and sentence from respondent's third trial. The allegation that Judge Heckemeyer "was very adamant" about respondent's incarceration would have been equally obvious to the Missouri Board of Probation and Parole from the fact that respondent was not placed on

probation by Judge Heckemeyer. The judge's recommendation, if it occurred, was quite reasonable. It was based on the strength of the evidence that convinced thirty-six jurors of respondent's guilt. Petitioner's Exhibit 6 indicates that Judge Heckemeyer merely wanted to enforce the same judgment that had been previously given to respondent.

Even assuming that this information was a startling revelation to the Missouri Board of Probation and Parole, the information should not invoke the *Pearce* presumption of vindictiveness for two independent reasons: First, there is no causal relationship between the knowledge of this information and the Missouri Board of Probation and Parol's denial of parole in September, 1985. The Missouri Board of Probation and Parole denied respondent parole because it was not in society's interest.

> In consideration of the offense for which you stand convicted and your prior criminal conviction record, in the opinion of the Board your release at this time would not be in the best interest of society.
>
> When you were paroled to your custody detainer, November 21, 1981, it was not the intent of the Board that you would be released from confinement. It was, in fact, the belief of the Board that because of your five-to-life sentence in the State of California that you would be incarcerated in that state for an extended period of time.

Respondent's Exhibit K-2. It is apparent that the Board considered the seriousness of respondent's crime, first-degree murder of a law enforcement officer, as well as respondent's prior life of crime. The obvious facts, as allegedly articulated by Judge Heckemeyer, were not the rationales of the Missouri Board of Probation and Parole's decision of September, 1985, to deny respondent parole.

The District Court cited several of respondent Thompson's exhibits for the proposition that the "Board believed that it should defer to the sentencing judge's wishes and that the Board indicated their deference on several occasions as previously noted." *Thompson v. Armontrout,* 647 F.Supp. at 1096 (App. A17). The District Court noted that that did not prove causation between the sentencing judge's alleged comment and the Board's September, 1985 action. *Id.* Likewise, nothing before the District Court even intimated a causal connection between Judge Heckemeyer's alleged comments and the September, 1985 Board action.

There is a second independent reason that the *Pearce* presumption does not apply. Significantly, there was no finding by the District Court that either Judge Heckemeyer's alleged comments or the Missouri Board of Probation and Parole's alleged action as a result of these comments were motivated by desire of self-vindication for respondent's prior successful habeas corpus litigation in the early 1980s. The Due Process Clause does not prohibit respondent's incarceration *unless* (1) there is a showing that there is more incarceration or punishment, (2) as a result of a motive for vindictiveness, (3) as a result of the prior successful appeal. The District Court made no ruling about this. The absence of a ruling is understandable since there was no evidence to support it. Under the doctrine of *Pearce* and its progeny, the District Court's ultimate legal conclusion is unsubstantiated.

The second area of "vindictiveness" articulated by the District Court demonstrates the District Court's fundamental misunderstanding of this area of the law. "The Board itself had a personal stake in vindicating the first parole decision made in 1980." *Id.* (App. A17). This sentence demonstrates that the District Court thought that use

of a magic word, "vindicating," would justify its decision. Petitioner submits that the United States Supreme Court would not find this ground supportive of the District Court's judgment. The rationale is indeed simple. First, the Due Process Clause prohibits a vindictive attitude springing from a defendant's successful use of the appellate process. Since respondent's prior litigation concerned the judgment of the Mississippi County Circuit Court, *Thompson v. White,* 661 F.2d at 103, not the judgment, practice or procedure of the Missouri Board of Probation and Parole, the Board had no "personal stake" in the prior litigation. The Missouri Board of Probation and Parole had only an academic interest in that litigation's outcome because no rule, regulation or decision of the Board was under scrutiny. *See Chaffin v. Stynchcombe,* 412 U.S. at 27, 93 S.Ct. at 1983.

The District Court also stated:

> One of the Board members who decided in 1980 to release [respondent] on parole to the detainer in California (resulting in [respondent's] release from imprisonment within four months) again considered [respondent] for parole after the State had spent the time and money necessary to convict the respondent for the third time. The Board obviously was desirous of redeeming itself in the eye of the public after respondent had obtained his release from California and imprisonment so quickly upon the Board's granting him parole in 1980. Only because [respondent] is such a successful "writ writer" was the Board faced with "having to do over what it thought it had already done correctly." . . . Clearly the Board had an interest in discouraging criminal defendants such as [respondent] from pursuing what it considers as meritless appeals after being paroled.

Thompson v. Armontrout, 647 F.Supp. at 1096 (App. A17-18). Noticeably missing from this quote are citations to the record. While use of the words "obviously" and "clearly" tends to distract one's attention from the lack of proof, it should not blind this Court. The District Court's statement assumes that the Board was motivated by a desire to redeem itself in the eyes of the public. It is apparent from the September 18, 1985 notice to respondent that the parole board was not so motivated. The Board felt that respondent had not served the time that the Parole Board expected respondent to serve in California. Accordingly, the seriousness of the Missouri crime, first-degree murder of a law enforcement officer, required continued incarceration of respondent (Respondent's Exhibit K-2). The Parole Board was not motivated by respondent's success as a "writ writer" against his California sentence, but rather, was motivated by the lack of time served in California pursuant to the Missouri judgment for first-degree murder. The Board was upset by the lack of time served in California, not the mechanism respondent used to decrease the amount of time served. The Board's September, 1985 decision would have been the same if respondent were released from the California sentence via habeas corpus, parole, furlough, or escape.

Lastly, the District Court believed that the Board had an interest in discouraging defendants from pursuing what it considered as meritless appeals after being paroled. *Id.* (App. A18). Surprisingly, no evidence in the record substantiates that conclusion. In particular, there is no evidence to suggest that the Board had an interest in discouraging respondent from pursuing his earlier habeas litigation against Mississippi County Circuit Court judgment. The Missouri Board of Probation and Parole has no interest

in requiring service of parole pursuant to an unlawful judgment. No penological purpose would be served. More importantly, justice would not be served. Not only is there no evidence in the record that suggests that the Missouri Board of Probation and Parole considered respondent's prior habeas litigation as meritless, but also there is no evidence in the records suggesting that the Board discourages any appeal, meritful or meritless, after parole.

The District Court concluded that: "Pressure from many sources caused the Board to punish [respondent] more severely because he had caused the Board and the State of Missouri to appear weak and incompetent to the public." *Id.* (App. A18). Again, no citations to the record was provided by the District Court. Likewise, the District Court assumed, without proof, that these alleged motives were the reason that Parole Board denied parole in September, 1985. There is no proof that "pressure from many sources" occurred as a result of respondent's prior successful habeas litigation. *Pearce* concepts cannot apply without the underlying factual and philosophical foundation.

If this Court were to disagree and rule that the *Pearce* presumption of vindictiveness applied, petitioner contends there is sufficient evidence in the record to overcome that presumption. There is sufficient rationale for respondent to have remained incarcerated. The sentencer is not restricted to evidence following the third trial to determine whether continued incarceration is justified. *See Texas v. McCullough,* 106 S.Ct. at 980-981. The judgment and sentence of the Circuit Court of Scott County (Respondent's Exhibit C) indicates that respondent is serving a sentence of life imprisonment. This is the same sentence he received following his second

conviction. The fact that respondent received the same sentence, in and of itself, negates any assertion that the sentencing judge was vindictive. Additionally, during the prior offender hearing, the trial judge displayed no vindictiveness in finding respondent to be a prior offender (Respondent's Exhibit D, pp. 1130-1131). Respondent voluntarily waived a pre-sentence investigation because Judge Heckemeyer was "well acquainted with [respondent's] record" (Respondent's Exhibit D, p. 1132). The trial judge's knowledge of respondent was based on the evidence of trial, respondent's appearance at hearings, and respondent's motions with the court (Respondent's Exhibit D, pp. 1134, 1138). In particular, the trial judge's behavior during the sentencing hearing demonstrated only patience for respondent (Respondent's Exhibit D, pp. 1141-1147a). It is apparent that the trial judge, Judge Heckemeyer, tailored the sentence of life imprisonment to take into account the person, as well as the crime. *Williams v. New York,* 337 U.S. at 250, 69 S.Ct. at 1084.

There is also no reason to believe that the Parole Board was acting in an illegal vindictive manner when it rejected parole for respondent in September, 1985. In the Board action of October 10, 1980, a sharply divided Board of Probation and Parole decided to allow respondent to go to California to serve his California sentence (Respondent's Exhibit F). At that time, respondent was expressly told that this was the sole reason for his parole (Respondent's Exhibit G). In fact, it was a condition of respondent's parole that he serve his California time.

> It is further ordered that you be released on parole to a detainer in favor of California State Prison, San Quentin, California; said parole to be served concurrently with your California sentence. It is further ordered that in the event you are released from the

> California authorities before your expiration date on your sentence from the Missouri Department of Corrections, you will continue under the supervision of this Board, Box 267, Jefferson City, Missouri, and will notify them prior to your release.

Respondent's Exhibit E. From this, it is clear that respondent was released so he could serve his five-to-life sentence for first-degree robbery in the State of California. The Missouri Board of Probation and Parole was not inclined to let the respondent, a twice-convicted murderer, walk the streets of Missouri or any other state.

Four months following his arrival in California to serve a five-to-life sentence, respondent was released (Respondent's Exhibit F). Respondent returned to Missouri, where he resided during his prior habeas corpus litigation and subsequent criminal retrial in Scott County, Missouri. Upon reconviction, respondent was returned to the Missouri Department of Corrections.

Upon respondent's return to the Missouri State Penitentiary, the Missouri Board of Probation and Parole made the following remarks in deciding that respondent should have a parole hearing in June, 1985.

> Subject paroled to custody, released by California court. It is not Board's intent to release to the streets. One life sentence was reversed. He was reconvicted and returned by the sheriff. Not a parole violator. Any relief should be with the court. The Board does not have the authority to in effect tell the Court that the conviction should not stand.

Respondent's Exhibit I. On the basis of this language and that of subsequent board action (Respondent's Exhibit J, K-1 and K-2), it is clear that the Parole Board was not acting out of any feelings of vindictiveness to

the respondent due to his conviction's being reversed in 1982. The only motivation by the Parole Board was due to the early release by the State of California. California kept respondent incarcerated for four months, not five years to life. The Parole Board stated this succinctly in its memorandum to respondent on September 18, 1985. It is apparent from that memorandum that the Parole Board's decision had no relationship to the 1982 reversal of respondent's conviction. The United States Court of Appeals for the Eighth Circuit scrutinized and reversed the Circuit Court of Mississippi County, not a decision or procedure of the Missouri Board of Probation and Parole. The Missouri Board had no "personal stake" in the prior conviction. The Board's feelings were not hurt when the Eighth Circuit reprimanded the Circuit Court of Mississippi County.

The District Court discounted respondent's proof that the presumption of correctness did not apply. The District Court thought that the Parole Board had information available that indicated the possibility that California may release respondent early. *Thompson v. Armontrout,* 647 F. Supp. at 1097 (App. A18-19). It is surprising that there is no proof for such an assertion by the District Court. Additionally, whether that information was available is not relevant. Even if the information was "clearly available," the Board did not consider it to be a likely scenario. If the Board had considered that scenario seriously, respondent would not have been allowed to go to California (Respondent's Exhibit F). Service of California time was the sole rationale for respondent's 1980 parole (Respondent's Exhibit G). Transfer to California was an expressed condition of respondent's 1980 parole (Respondent's Exhibit E). Additional proof that the information was not "clearly available" or was not seriously considered is evident from the Parole Board's remarks that respondent should have a

parole hearing in June, 1985. The Parole Board commented that respondent was paroled to custody, not release to the streets (Respondent's Exhibit I). That concept was confirmed by the Parole Board's articulation of its reasoning to respondent on September 18, 1985. The District Court also condemned the Parole Board's September, 1985 decision because it did not cite any intervening information concerning respondent's conduct or culpability that would justify continued incarceration. *Id.* (App. A19). Of course, such a statement about the District Court is obtuse given the Parole Board's statement that the earlier parole to the California detainer was designed for respondent to continue incarceration for his five-to-life sentence in California.

The reason for the detailed analysis of the District Court's opinion is due to the Court of Appeals' abdication of its appellate review function. The Court of Appeals held that the vindictiveness concept of *Pearce* is a factual finding, subject to the "clearly erroneous" standard of review. *Thompson v. Armontrout,* 808 F.2d at 31 (*citing, Anderson v. City of Bessemer City,* 470 U.S. 564, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985) (App. A6)). Petitioner agrees that findings of historical fact are subjected to the clearly erroneous standards on federal appellate review. F.R.Civ.P. 52(a). The *Pearce* concept of vindictiveness, however, is more than a historical fact. A finding of improper unconstitutional vindictiveness involves more than historical facts. It involves application of a legal standard, *Pearce* and its progeny, to the underlying historical facts. This Court has never applied the clearly erroneous standard of review to *Pearce* questions. This explains why *Pearce* has progeny. *De novo* review of the District Court's judgment was warranted but not performed by the United States Court of Appeals for the Eighth Circuit.

Even applying a clearly erroneous standard to the conclusions of the District Court there is no evidence to

support those conclusions. As discussed earlier in this petition to this Court, the findings by the District Court are erroneous as there was no evidence to support them.

When respondent was paroled to California, it was Parole Board's expectation that respondent serve his five-to-life sentence in that state. It was not the Parole Board's expectation that respondent be released after four months. The Court of Appeals' skepticism of Missouri's rationale is transparent. The Court of Appeals asserted that if Missouri really wanted respondent to serve more time, then parole should have been revoked after respondent's 1981 release from California custody. *Thompson v. Armontrout,* 808 F.2d at 32 (App. A8). That analysis is facile. While the California release did not fulfill the Parole Board's subjective expectation, the release did not violate any condition of parole (Respondent's Exhibit E). Since no condition of the parole release was violated, the Board had no authority to revoke parole. *See Morrissey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). While the Parole Board would have liked to have revoked respondent's parole following the California release, the Board had no authority or power to do so since no condition had been violated.

The Court of Appeals' suggestion that the Parole Board could have made a complaint to California authorities about the early release is nonsensical. *See Thompson v. Armontrout,* 808 F.2d at 32 (App. A8). Since respondent was released from California custody via a writ of habeas corpus, a "complaint to the California authorities" would have been futile. The Court of Appeals does not suggest to whom this complaint should have been directed or what the substance of the complaint might be. The bottom line is that a complaint to California authorities would have done no good. The Parole Board cannot be faulted for failing to do a futile act.

The Court of Appeals also held that the Board's expectation that respondent would serve five-to-life in California was objectively unreasonable. *Id.* (App. A8). That is irrelevant since one should look at the Board's subjective expectation in 1980 to determine whether it was subjectively acting vindictively in 1985. The Parole Board's subjective determination to deny respondent parole in 1985 cannot be considered vindictive when respondent served only a few months of what was subjectively expected to be at least a five year term of incarceration. Of course, the Parole Board subjectively considered that the respondent might have been released prior to the completion of his life term in California. That explains why respondent was to remain in contact with the Parole Board in the event of release by California authorities prior to respondent's death (Respondent's Exhibit E). The Court of Appeals' use of an objective standard makes no sense where *Pearce* is grounded in the concept of actual subjective motives. Even if an objective standard were correct, the Court of Appeals did not explain how the Parole Board should have reasonably expected that respondent be released from California custody through a writ of habeas corpus after only four months of incarceration.

The Court of Appeals was also incorrect in its statement that the Board anticipated respondent's release before completion of the minimum term of five years. *Thompson v. Armontrout*, 808 F.2d at 32 (App. A8). Upon respondent's parole, the Parole Board stated "in the event you are released from the California authorities before your expiration date on your sentence from the Missouri Department of Corrections, you will continue under the supervision of this Board . . ." (Respondent's Exhibit E). The Court of Appeals' tortured reading of this language by the Parole Board was to the effect that the Board contemplated that respondent may be imprisoned for less than five years.

That reading of this language is impossible. Since the expiration date of respondent's Missouri sentence was respondent's date of death, the only reasonable reading of the Board's language was that in the event respondent was released from California before his death, then he would remain under the supervision of the Board. The clear subjective expectation of the Board was that respondent remained incarcerated in California for at least five years.

The Board's September, 1985 denial of parole to respondent was not due to any improper vindictive motion in violation of *Pearce* and its progeny. Rather, the September, 1985 denial of parole occurred because respondent owed and continues to owe the State of Missouri more incarceration for his murder of the police officer as well as for his other murder. The Court of Appeals' failure to recognize this requires review and reversal.

CONCLUSION

The petitioner respectfully requests that the petition for a writ of certiorari be granted and that the Court of Appeals' judgment be similarly reversed. Alternatively, he requests that the petition be granted and that full briefing and argument be scheduled.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2308

Douglas W. Thompson,
Appellee,

v.

Bill Armontrout,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: December 10, 1986
Filed: December 23, 1986

Before JOHN R. GIBSON, FAGG, and MAGILL, Circuit Judges.

MAGILL, Circuit Judge.

Douglas Thompson is currently serving a life sentence in the Missouri State Penitentiary. He has been tried for the same crime three times and has served nearly twenty years in prison. His request for parole was denied without a hearing. He had been previously paroled after serving fourteen years on his second conviction. Although Thompson was a productive member of society during his three years on parole, he was nonetheless denied parole after his

third trial, which was held after he successfully used the appellate process to reverse his second conviction.

Armontrout, Warden of the Missouri State Penitentiary at Jefferson City, Missouri, appeals from the district court's order[1] releasing Thompson on parole from the Penitentiary. We granted a stay of the district court's order pending this appeal, and we now vacate the stay and affirm the judgment of the district court.

I. FACTS.

In 1961, Thompson was tried in Missouri state court for murder. He was convicted and sentenced to death. After an unsuccessful direct appeal, his conviction was reversed in 1963 pursuant to rule 27.26, Mo. Rev. Stat.[2] because the State had suppressed material evidence. When his conviction was reversed, Thompson had spent two years in jail. In 1966, Thompson was retried in another Missouri state court, and was reconvicted and sentenced to life imprisonment, and, thereafter served fourteen more years in the Missouri State Penitentiary.

During this time, Thompson filed a number of claims for relief in state and federal court. The nature and disposition of these claims is set out in *Thompson v. White*, 661 F.2d 103, 104-105 (8th Cir. 1981). Most pertinent to our discussion is that on September 10, 1975, Thompson

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1. The Hon. Scott O. Wright, Chief Judge, United States District Court for the Western District of Missouri.

2. This section provides in pertinent part:

> A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of this state or the United States, * * * or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside, or correct the same.

filed for relief in the Missouri state court alleging, *inter alia*, that his jury had been unconstitutionally selected. On March 10, 1985, Thompson moved for removal of the jury selection issue to federal district court on the grounds that the State had deliberately delayed his case. The district court dismissed the claim.

On November 21, 1980, Thompson was paroled to a custody detainer lodged by the State of California,[3] to serve a prior California sentence for an unrelated crime. Although the California sentence was five years to life, Thompson filed a successful habeas corpus petition and was released from jail in California after four months, on March 24, 1981. After his release, Thompson remained under the supervision of the Missouri Parole Board.

Thompson, also, had appealed the Missouri district court's dismissal of his jury selection claim to this court, and on October 14, 1981, we reversed the dismissal and vacated his conviction.[4] In 1984, Thompson was retried in Missouri a third time and was again sentenced to life imprisonment. After being free for three years under the supervision of the Board and a productive member of society, he returned to the Missouri State Penitentiary and is there now.

After returning to prison in 1984, Thompson requested release on parole from the Board. This request was denied without a hearing, and is the central issue in this appeal.

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3. *See* Interstate Agreement on Detainers, 18 U.S.C. app. §§ 1-8 (1982).

4. Our opinion in *Thompson v. White*, 661 F.2d 103 (8th Cir. 1981), was appealed by the State. The Supreme Court granted certiorari, vacated the judgment, and remanded the case to us for further consideration in light of *United States v. Frady*, 456 U.S. 152 (1982). We affirmed our prior decision on remand in *Thompson v. White*, 680 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1177 (1983).

After the Board had spoken, Thompson sought, and received, release on habeas corpus in federal district court. This court, however, stayed his release from prison until the State's appeal could be heard.

II. APPLICABLE LAW.

In granting Thompson habeas corpus relief, the district court relied on the following body of law.

North Carolina v. Pearce, 395 U.S. 711, 725-26 (1969), established that "[d]ue process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." In *Pearce*, the defendant had been tried and sentenced to twelve to fifteen years imprisonment. He reversed his conviction and upon retrial was sentenced, by the same judge, to what amounted to a longer term. The Supreme Court held as follows:

> In order to assure the absence of [retaliatory motivation on the part of the sentencing judge], we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reason for his doing so must affirmatively appear.

"In sum, the Court applied a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence." *United States v. Goodwin*, 457 U.S. 368, 374 (1981).

The *Pearce* Court also held that "punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense." *Pearce* at 718-19.

The key element in *Pearce* is "vindictiveness" by the sentencing party in response to a prisoner's successful use of the appellate process. Thus, in cases where a second

sentence has been greater than the first, but different judicial bodies imposed the two sentences, *Pearce* has not applied. In *Colten v. Kentucky,* 407 U.S. 104 (1972), a different court imposed the second, harsher sentence, and the presumption of vindictiveness was not applied. Similarly, in *Chaffin v. Stynchcombe,* 412 U.S. 17 (1973), where a different jury imposed a harsher second sentence, the presumption was not applied.

III. DISTRICT COURT OPINION

Against this backdrop, the district court found that the Board, after releasing Thompson to California on parole in 1980, had vindictively denied him parole in 1984. The reasons for the Board's vindictiveness were: (1) The sentencing judge in Thompson's third trial strongly recommended to the Board that Thompson not be paroled, and (2) the Board wished to redeem itself in the public eye after Thompson's rapid California release, *i.e.,* the Board had "to do over what it thought it had already done correctly," and thus Thompson made the Board and the State of Missouri appear "weak and incompetent."

The district court recognized that although *Pearce* and its progeny referred to a *judge's* vindictiveness, "due process require[s] that the same standard apply to the action of the Parole Board under [these] facts. * * * If the judge had sentenced petitioner to life imprisonment without possibility of parole, such a sentence would be *a fortiori* more severe for due process purposes than the previous life sentences [with parole]."

IV. DISCUSSION.

A. Applicability of *Pearce*.

The State has argued in its brief that the *Pearce* doctrine is inapplicable to this case. The State also argued

that the goal of *Pearce* was to stop vindictiveness in sentencing by the same trial judge who had been reversed by an appellate court, and here, the two life sentences were imposed by two different judges, negating the application of *Pearce*.

Because of the State's concession at oral argument, we need not decide in this case whether *Pearce is* narrowly limited to judges only, or whether it can apply to other sentencing entities as well. In this regard counsel for the State conceded at oral argument that the *Pearce* doctrine could be applicable, under the right factual circumstances, to the actions of the parole board. Counsel argued, however, that the facts in this case did not justify application of *Pearce*. After examining the district court's findings and the record, we think otherwise.

We thus conclude that, under the State's concession and the facts of this case, it was proper to apply the *Pearce* doctrine to the actions of the Board. In reaching this conclusion, however, we emphasize that the general applicability of the *Pearce* doctrine to parole boards is still an open issue in this Circuit. We stress, as did the district court, that this opinion is dictated by the unique facts of this case, and hold only that under the facts of *this* case, the rationale in *Pearce* applies to the actions of *this* parole board.

B. Vindictiveness.

The State denies that the Board acted through improper and vindictive motives. We note that the district court's findings as to vindictiveness are findings of fact, which we can set aside only if "clearly erroneous." *Anderson v. City of Bessemer City,* 105 S.Ct. 1504, 1512 (1985). We conclude that the district court's findings are not clearly erroneous.

The State points to the 1980 Board Order releasing Thompson to California as conclusive evidence that "it was a condition of petitioner's parole that he serve his California time." The Order stated:

> It is further ordered that you be released on parole to a detainer in favor of California State Prison, San Quentin, California; said parole to be served concurrently with your California sentence. It is further ordered that in the event you are released from the California authorities before your expiration date on your sentence from the Missouri Department of Corrections, you will continue under the supervision of this Board, Box 267, Jefferson City, Missouri, and will notify them prior to your release.

The State denies that the Board felt a need to redeem itself in the eyes of the public after Thompson was released, and asserts that the Board was motivated solely by the lack of time Thompson served in California. In this regard, the State points to a memorandum the Board wrote to Thompson in 1985, when they denied him parole, which states in pertinent part:

> When you were [sent to California on] your custody detainer, November 21, 1980, it was not the intent of the Board that you would be released from confinement. It was, in fact, the belief of the Board that because of your five-to-life sentence in the State of California that you would be incarcerated in that state for an extended period of time.

The State argues that the Board was therefore not extending Thompson's sentence, but was adjusting an unanticipated lenient sentence. In sum, the main thrust of the State's argument is that service of at least five years in California prison was the sole rationale, and the express reason, for Thompson's 1980 parole.

We are skeptical of this argument. As Thompson points out, following his release from California in 1981, he was free for nearly three years, under the supervision of the Board. During this time, the Board made no complaint to the California authorities regarding the early release, and made no attempt to revoke his parole. Furthermore, as the district court pointed out, an early release by California was a potential factor that the Board should have taken into account in granting parole in 1980. Even if the Board did expect Thompson to serve a longer time in California, by releasing him to the California prisons, the Board took a gamble as to the rest of his term, and retained no reasonable expectation of control over the length of his sentence. The two documents relied on by the Board, as proof of their intent and expectation that Thompson be imprisoned in California for at least five years, are not very convincing.

The Order authorizing Thompson's release to California does not clearly state the Board's intention that he remain imprisoned for at least five years; if anything, it anticipates the possibility that he will be released sooner, by stating: "[I]n the event you are released from the California authorities before your expiration date on your sentence from the Missouri Department of Corrections, you will continue under the supervision of this Board * * *." Thus, the Order appeared to expressly contemplate what happened here.

We decline to accord substantial evidentiary weight to the Memorandum explaining the reasons for Thompson's denial of parole in 1985. As Thompson points out, it appears to be an "after the fact justification" for the denial of parole. It is contradicted by the intent we discern from the Order authorizing Thompson's release to California.

In sum, we think the critical facts are that, when Thompson was released to California, it was ordered that, if released from the California authorities, he would "continue under the supervision of this Board." He did so until he was successful in reversing the Missouri conviction, and then upon reconviction he did not continue under the supervision of the Board but, rather, was sentenced to the penitentiary and parole denied. It is on this basis that we find justification for concluding that Judge Wright was not clearly erroneous in his finding of vindictiveness.

C. Appropriate Remedy by District Court.

The State argues that in the event Thompson prevails, the district court nonetheless erred in granting Thompson release on parole, for by doing so, it impermissibly sat as a "super parole board," and ignored considerations of comity. The State argues that the proper remedy would have been to allow the State to correct the due process violation by having the Board hold a new hearing, but without exercising their allegedly vindictive motives.

We reject the State's contention because it failed to raise this matter in the district court. It is the oft-stated rule in this Circuit that we do not rule on issues not raised below. *Singleton v. Wulff,* 428 U.S. 106, 120-21 (1976).

We thus hold that the district court correctly ordered Thompson's release on parole. Based on the foregoing, we affirm the judgment of the district court.

LET OUR MANDATE ISSUE FORTHWITH.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2308WM

Douglas W. Thompson,
Appellee,

vs.

Bill Armontrout,
Appellant.

Appeal from the United States District court for the
Western District of Missouri

Appellee's pro se motion for reconsideration is denied.

January 27, 1987

Order Entered at the Direction of the Court

/s/ (Illegible)
Clerk, U.S. Court of Appeals,
Eighth Circuit

(Filed September 17, 1986)

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 85-0989-CV-W-5-P

DOUGLAS W. THOMPSON,
Petitioner,

vs.

BILL ARMONTROUT,
Respondent.

OPINION AND ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner's *pro se* habeas corpus petition filed pursuant to 28 U.S.C. § 2241 and 2254 (1976), seeks relief from a 1985 decision of the Missouri Board of Probation and Parole denying petitioner parole release. Petitioner's "First Amended Petition for Writ of Habeas Corpus" sets forth one claim in support of relief. Petitioner contends that the records of the Missouri Board of Probation and Parole reflect that its decision to deny petitioner release upon parole was based exclusively upon the vindictiveness of the sentencing judge and the parole board against petitioner because petitioner had successfully challenged his state court conviction for first degree murder. Petitioner contends that his constitutional right to due process of law was violated by the Parole Board's decision. Because petitioner raised the above ground in his petition for writ of habeas corpus in state court, respondent has conceded exhaustion of petitioner's available state remedies.

The Court has determined that no further evidentiary hearings are required in this case and that the dispute can be resolved on the basis of the record. *Brown v. Lockhart,* 781 F.2d 654, 656 (8th Cir. 1986).

A brief summary of the facts underlying petitioner's ground for relief indicates that petitioner has been convicted three times, in three successive trials, of the 1961 first degree murder of a Cape Girardeau, Missouri police officer. Petitioner first was convicted and sentenced to death in the Circuit Court of Bollinger County, Missouri, in December, 1961. Although that conviction was affirmed on direct appeal, *State v. Thompson,* 363 S.W.2d 711 (Mo. banc 1963), petitioner eventually obtained a reversal of the conviction through a Rule 27.26 proceeding. *State v. Thompson,* 396 S.W.2d 697 (Mo. banc 1965). In 1966, petitioner was retried and reconvicted in Mississippi County, Missouri and sentenced to life imprisonment. Petioner was incarcerated in the Missouri State Penitentiary pursuant to the life sentence until November 21, 1980, when petitioner was released on parole to a detainer placed upon him by the State of California. Four months later, petitioner was released from incarceration in California pursuant to a writ of habeas corpus on March 24, 1981. Petitioner remained under parole supervision of the Missouri Board of Probation and Parole until January, 1983, when his second conviction was overturned by the United States Court of Appeals for the Eighth Circuit. *Thompson v. White,* 661 F.2d 103 (8th Cir. 1981), *vacated* and *remanded,* 456 U.S. 951 (1982), *aff'd on remand,* 680 F.2d 1173 (8th Cir. 1982), *cert. denied,* 459 U.S. 1178 (1983). Once again, the State of Missouri decided to retry petitioner for first degree murder. Petitioner was convicted for the third time on the murder charge on December 13, 1984, and was sentenced to life imprisonment

for the second time. Upon reconviction in 1984, petitioner was returned to the Missouri State Penitentiary, where he presently is incarcerated.

As soon as petitioner was reconvicted in 1984, he began challenging that reconviction. See Petitioner's Exhibit 4. The Missouri Board of Probation and Parole originally took the position that they would defer a decision concerning petitioner's request for release on parole pending a resolution of petitioner's challenge to his reconviction in state court. The Board's position is reflected in their review of petitioner's case on January 22, 1985 (Petitioner's Exhibit 7); their letter to petitioner on February 4, 1985 (Petitioner's Exhibit 5); their decision of June 14, 1985 (Petitioner's Exhibits 8 and 12); the letter to petitioner's state court attorney on June 27, 1985 (Petitioner's Exhibit 11); and a note to Dick Moore, Chairman of the Missouri Board of Probation and Parole, on August 15, 1985 (Petitioner's Exhibit 10).

Only after petitioner's state court attorney informed the Board that their decision to defer action on petitioner's parole request pending court resolution of the issues was in direct conflict with the Board's own rules and regulations did the Board issue an opinion supposedly considering petitioner for parole release. *See* Petitioner's Exhibit B. That decision, dated September 18, 1985, was based on the same parole hearing as the decision of June 14, 1985. The Board's decision stated as follows:

> In consideration of the offense for which you stand convicted and your prior criminal conviction record, in the opinion of the Board your release at this time would not be in the best interest of society.
>
> When you were paroled to your custody detainer, November 21, 1980, it was not the intent of the Board

> that you would be released from confinement. It was, in fact, the belief of the Board that because of your five to life sentence in the state of California that you would be incarcerated in that state for an extended period of time.

Petitioner's Exhibit 3; Respondent's Exhibit K-2.

In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment prevents an increased sentence after a criminal defendant has successfully challenged a conviction and has been reconvicted when the increased sentence is motivated by vindictiveness on the part of the sentencing judge. The Court stated:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be

> made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Id. at 725-726.

In *Wasman v. United States,* ..... U.S. ....., 104 S.Ct. 3217 (1984), the Supreme Court indicated that relevant conduct or events that occurred subsequent to the original sentencing proceedings are those that throw "new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.'" *Id.* at 3225-26 (Powell, J. concurring), *quoting North Carolina v. Pearce,* 395 U.S. at 723. Due process bars an increased sentence where no intervening conduct or events justifies the increase, *United States v. Whitley,* 734 F.2d 994, 996 (4th Cir. 1985), or where no objective information concerning petitioner's conduct or culpability justifying the increase has been received. *Texas v. McCullough,* ..... U.S. ....., 106 S.Ct. 976, 980-981 (1986).

While the above decisions refer to vindictiveness and retaliatory motive on the part of a *sentencing judge* in imposing a more severe *sentence* upon reconviction, the dictates of due process require that the same standard apply to the action of the Parole Board under the facts set forth herein. Initially, the due process considerations set forth in *Pearce* apply to situations in which the state seeks to punish a criminal defendant for having exercised his post-conviction right of review. *North Carolina v. Pearce,* 395 U.S. at 726. When an improper retaliatory motive or vindictiveness results in an increase in punishment imposed after a conviction or retrial, due process has been offended regardless of the form of that increased punishment (be it imprisonment, suspended sentence with probation, or fine). *See United States v. Gilliss,* 645 F.2d 1269, 1283

(8th Cir. 1981). Thus, the *Pearce* presumption of vindictiveness may apply to second sentences which are more severe in terms of parole eligibility. If the judge had sentenced petitioner to life imprisonment without possibility of parole, such a sentence would be *a fortiori* more severe for due process purposes than the previous life sentences. *See, e.g., United States v. Bello,* 767 F.2d 1065, 1068 (4th Cir. 1985); *United States v. Gilliss,* 645 F.2d at 1283; *United States v. Hawthorne,* 532 F.2d 318, 323-324 (3d Cir.), *cert. denied,* 429 U.S. 894 (1976).

The fact that the arm of the state which has imposed the increased punishment on petitioner in this situation is the Parole Board, and not a sentencing judge, should not prevent the Court from applying the *Pearce* presumption of vindictiveness to petitioner's increased punishment at issue herein. The Parole Board acted with a similar retaliatory motive as a sentencing judge would act and with the same result—the threat inherent in the Board's actions would, with respect to those already on parole but still under conviction, serve to "chill the exercise of basic constitutional rights." *North Carolina v. Pearce,* 395 U.S. at 724. The state cannot circumvent the dictates of due process merely by having the Parole Board deny petitioner parole release upon reconviction instead of resentencing petitioner to a life sentence without parole.

The record and file herein indicate several impermissible motives for the Board's denial of petitioner's parole release. First, the sentencing judge in petitioner's third trial provided information to the Board that stated that petitioner has been convicted three times of first degree murder and that thirty-six of his peers had found him guilty and recommended that he serve a life sentence

in the penitentiary. The sentencing judge "was very adamant about [petitioner] being kept at the penitentiary and not be paroled." Petitioner's Exhibit 5. This information apparently was presented to all members of the Board as reflected by their initials at the bottom of Petitioner's Exhibit 6. Clearly, the Board believed that it should defer to the sentencing judge's wishes in that the Board indicated their deference on several occasions as previously noted. *See* Petitioner's Exhibits 5, 7, 8, 10, 11, and 12. Only after petitioner's state court attorney brought the error of their thinking to the Board's attention did the Board issue the September 18, 1985, decision stating that petitioner's release on parole would not be in the best interests of society and that the Board had believed that petitioner would be incarcerated in California for "an extended period of time" when it released him on November 21, 1980. Petitioner's Exhibit 3; Respondent's Exhibit K-2.

Second, the Board itself had a personal stake in vindicating the first parole decision made in 1980. *See Chaffin v. Stynchcombe*, 412 U.S. 17, 27 (1973). One of the Board members who decided in 1980 to release petitioner on parole to the detainer in California (resulting in petitioner's release from imprisonment within four months) again considered petitioner for parole after the state had spent the time and money necessary to convict petitioner for the third time. The Board obviously was desirous of redeeming itself in the eyes of the public after petitioner had obtained his release from California and imprisonment so quickly upon the Board's granting him parole in 1980. Only because petitioner is such a successful "writ writer" was the Board faced with "having to do over what it thought it had already done correctly." *United States v. Goodwin*, 457 U.S. 368, 383 (1982), *quoting Colter v. Kentucky*, 407 U.S. 104, 117

(1972). Clearly, the Board has an interest in discouraging criminal defendants such as petitioner from pursuing what it considers as meritless appeals after being paroled. *Chaffin v. Stynchcombe*, 412 U.S. at 27.

Pressure from many sources caused the Board to punish petitioner more severely because he had caused the Board and the State of Missouri to appear weak and incompetent to the public. Given the above factors, the Court concludes that a presumption of vindictiveness should apply to the Board's decision to refuse to release petitioner on parole after he was convicted for a third time in 1984.

The *Pearce* presumption of vindictiveness may be overcome only by objective information concerning identifiable conduct on the part of petitioner either occurring since the time of the original parole decision, *Wasman v. United States*, 104 S.Ct. at 3225-26, or brought to the Board's attention since the time of the original parole decision. *Texas v. McCullough*, 106 S.Ct. at 980-981. Respondent apparently argues that the fact that the State of California did not incarcerate petitioner for as long a period of time as the Board had anticipated is sufficient new information to overcome the *Pearce* presumption of vindictiveness. Respondent, in fact, states that any vindictiveness by the Parole Board would be due to the betrayal by California, not due to petitioner's obtaining a reversal of his second conviction. Response to Court Order of June 2, 1986, at 12.

The Court does not consider respondent's argument to be persuasive. The possibility that the State of California might release petitioner from incarceration sooner than the Board had anticipated was information clearly available to the Board in 1980. Such a possibility is one that frequently must be considered by the Board upon

parole release determinations. Further, in the 1985 decision to deny parole release the Board did not cite any intervening information concerning petitioner's conduct or culpability which would justify a more severe punishment after his reconviction in 1984. In fact, petitioner remained on parole for almost three years as a productive member of society before his reconviction in 1984. Finally, a review of the Board's own files reflects their retaliatory motive and vindictiveness toward petitioner for obtaining a reversal of his conviction, as previously discussed. As an arm of the State of Missouri, the Board's vindictiveness violates petitioner's due process rights as surely as if the sentencing judge had given petitioner a sentence of life without parole. Such a flagrant refusal to make a reasoned parole decision based upon identifiable conduct on the part of petitioner occurring since the time of the original parole decision in 1980 or occurring at the time of the crime at issue but brought to the Board's attention since the time of the original parole decision also is an abuse of the Board's discretion.

Accordingly, it is ORDERED that:

(1) the above-captioned petition for writ of habeas corpus is granted;

(2) petitioner's release will be stayed in order for the respondent to have an opportunity to file a notice of appeal;

(3) if the respondent fails to file a timely notice of appeal, the writ will issue forthwith.

/s/ Scott O. Wright
Scott O. Wright
United States District Judge

Kansas City, Missouri.
Dated: 9/17/86

(Filed October 6, 1986)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 85-0989-CV-W-5

DOUGLAS THOMPSON,
Petitioner,

vs.

BILL ARMONTROUT,
Respondent.

ORDER

On September 17, 1986, this Court issued its Opinion and Order Granting Petition for Writ of Habeas Corpus in the above-captioned cause of action. By way of clarification and pursuant to Rule 60(a), F. R. Civ. P., the Court specifically states that in granting petitioner's First Amended Petition for Writ of Habeas Corpus, which clearly sought relief in the form of release upon parole, the Court is granting petitioner's request for release from incarceration and directing respondent to place petitioner on parole.

IT IS SO ORDERED.

/s/ Scott O. Wright
Scott O. Wright
United States District Judge

Kansas City, Missouri,
Dated: OCT 6 1986